

STATE OF MAINE

YORK, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-08-14

STATE OF MAINE,

Plaintiff

v.

ORDER

PRICE-RITE FUEL, INC.,
VEILLEUX OIL AND SERVICE, INC.,
PERRON FUEL, INC. and
NICHOLAS CURRO, III,

Defendants

In this case the State has brought a five-count complaint against the Defendants alleging, in essence, unfair and deceptive sales practices with respect to pre-paid heating fuel contracts sold to residential consumers. It seeks damages, penalties, counsel fees and injunctive relief. It was heard at a non-jury trial on February 9 & 10, 2009.¹

FACTS

Nicholas Curro, III (N. Curro) operated Price-Rite Fuels of Wells, Maine, which sold home heating fuel. In July 2005 he, along with his brother, Billy Curro, purchased Veilleux Oil & Service, Inc., an established home heating fuel dealership in Biddeford, Maine. Later he acquired Perron Oil, Inc., another Biddeford home heating fuel supplier. The operations of these companies were merged, but they retained their

¹ By agreement the issues for trial were bi-furcated. This hearing focused on the issue of liability, including the personal liability, if any, of Nicholas Curro, III.

separate public identities as Price-Rite Fuel, Inc., Veilleux Oil & Service, Inc. and Perron Fuel, Inc. (the companies). N. Curro is the president and chief executive of all companies; Billy Curro is treasurer and together they are the only shareholders.

The companies sold prepaid home heating fuel contracts for 2005/2006 and the 2006/2007 heating seasons and delivered on these contracts to their customers without any serious difficulty. The companies used various wholesale oil dealers for their supply, principally Sprague Energy.

N. Curro was the chief executive officer of the companies. He made the day-to-day decisions concerning the financial and operational aspects of the businesses. He was personally involved in formulating and marketing the prepaid contracts.

Through the summer and fall of 2007, the companies again sold prepaid home heating fuel contracts to consumers. The contracts were for a specific quantity of oil at a fixed price paid for in advance. Homeowners were required to be on an automatic delivery schedule.

Also leading into the 2007/2008 heating season the companies were carrying a large unpaid balance due Sprague Energy for oil purchased the previous year. The balance was in excess of a half-million dollars and the companies had signed notes, including personal guarantees from the Curro brothers, which called for monthly payments, with a "balloon" payment due in July 2007 to bring the accounts with Sprague Energy current. The required payments were not timely made and the companies were in default by August 2007.

Beginning in April 2007, Sprague Energy agreed to continue selling oil to the companies but on a "cash only" basis. Sprague Energy indicated through its sales representative that it would be willing to re-establish a credit relationship with the companies, but only after they had fully paid their outstanding balances. The

companies' financial statements as of August 31, 2007 showed that the companies had sold over \$600,000 in prepaid home heating oil contracts but had less than \$100,000 available to service the contracts. In November 2007 the companies and N. Curro met with Sprague Energy in an attempt to re-establish a credit relationship. The request was denied by Sprague Energy.

By December 2007 the companies were unable to purchase sufficient heating oil to service their prepaid customers. The companies ceased making automatic deliveries and customers were required to call in for deliveries, which were for limited quantities. By late December 2007 the companies were in financial chaos. In January 2008 all deliveries stopped and the companies ceased operations.²

Maine law requires that dealers selling prepaid home heating oil contracts must provide security for those contracts in advance in one of three forms: 1) a contract for the purchase of at least 75% of the fuel which has been sold through prepaid contracts; 2) a bond covering 50% of the amount sold; or 3) a letter of credit equal to 100% of the amount sold. 10 M.R.S.A. §1110. The companies and N. Curro personally knew of this statutory obligation and explicitly told at least some customers that the companies were in compliance with the statute when he knew that they were not in compliance and at a time when the solvency of the companies was in question.

DEFENDANT'S MOTION FOR JUDGEMENT

At the conclusion of the State's case in chief the Defendants moved for dismissal or judgment on the basis that the State did not comply with the statutory requirement that the Attorney General provide ten days notice before filing an Unfair Trade Practice Act complaint to provide a potential defendant with an opportunity to confer with and,

² On or about January 22, 2008 the Biddeford Police obtained a search warrant and seized the companies' records. This was the immediate cause of the shut down. However, the financial situation of the companies was such that they could barely function.

presumably, resolve the complaint before litigation is commenced. 5 M.R.S.A. §209. It is undisputed that the notice was not provided.

The Defendants argue that N. Curro was arranging for additional financing which may have permitted the companies to continue to provide heating fuel to customers with prepaid contracts. However, once suit was initiated, the publicity generated thereby undercut the efforts to secure additional financing.

The State argues that the Defendants were aware of the State's investigation before the complaint was filed, that there was a need for immediate action to prevent irreparable harm and that the Defendants failed to raise this issue until after trial, effectively waiving this defense.

The complaint was filed on January 18, 2008. On February 7, 2008 the State filed a request for a temporary restraining order freezing the defendants assets. The request for a T.R.O. was supported by, among other affidavits, a request for a search warrant granted by the District Court on January 22, 2008. The warrant was promptly executed, the police seized the companies' records and Mr. Curro testified that this action effectively shut down the business. The Biddeford Police were, apparently, acting independently from the Attorney General's office.

The failure to provide notice prior to the commencement of litigation does not deprive the Superior Court of subject matter jurisdiction. The obvious purpose of the notice requirement is to offer the parties an opportunity to resolve an alleged violation promptly and efficiently, without the cost and inconvenience associated with the litigation process.

While I acknowledge the salutary purpose behind the notice requirement and agree that the State, particularly, needs to follow the law, the motion for judgment as a matter of law is Denied for several reasons.

First, the affidavits and supporting materials filed in support of the T.R.O. demonstrate a need for immediate action to prevent potentially irreparable injury. Next, notice and an opportunity to confer likely would have been futile in light of the independent actions of the police, which forced a shut down the business within days of the filing of the complaint. Lastly, the proper remedy had the issue of lack of notice been raised sooner would be to stay the proceeding to permit the parties to confer. In these circumstances, this would again be a futile gesture.

To grant the motion would deprive the State and the consumers it seeks to protect of potential remedies in a situation where prior notice would not have offered the Defendants with a realistic opportunity to continue in business.

CONCLUSIONS

10 M.R.S.A. §1110 is clearly intended to be a consumer protection statute. It is designed to insure that sellers of prepaid heating fuel contracts have either secured in advance a source of supply to service the contracts or have sufficient financial resources to purchase such a supply or refund prepayments. While not a legislatively designated *per se* violation of the Unfair Trade Practices Act, 5 M.R.S.A. §207, a violation of 10 M.R.S.A. §1110 is evidence of a violation of U.T.P.A. Selling prepaid contracts without having the security required by 10 M.R.S.A. §1110, under the circumstances of this case is a violation of U.T.P.A.

CORPORATE LIABILITY

The State has established that Price-Rite Fuel, Inc., Veilleux Oil & Service, Inc. and Perron Oil, Inc. have violated the U.T.P.A. acting through their principal agent, N. Curro. The companies sold prepaid home heating fuel contracts for the 2007/2008 heating season when they knew they had not met the security measures required of them by 10 M.R.S.A. §1110 and at a time when their financial viability was in serious

question. They failed to disclose this to consumers and, at least in some cases, affirmatively misrepresented the facts. The companies intentionally engaged in these deceptive acts.

MR. CURRO'S LIABILITY

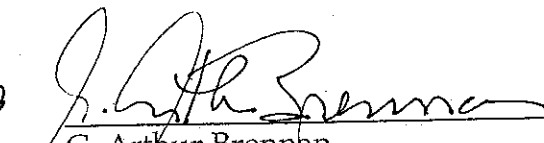
Mr. Curro, as president and chief executive of the companies, was personally and actively involved in formulating and selling prepaid heating fuel contracts for the 2007/2008 heating season. He set the contract prices and directed the sales effort. He was personally aware of the security requirements imposed by 10 M.R.S.A. §1110; he knew that the companies had not met the statutory security requirements; he knew that the companies were in a precarious financial position; at his direction at least some customers were mis-informed to the effect that the companies were in compliance with 10 M.R.S.A. §1110. Nevertheless, he directed that the companies continue to sell the prepaid contracts.

An officer of a corporation who intentionally and knowingly violates the U.T.P.A. is personally liable for damages and penalties arising from such a violation. I find and conclude that the State has established that Mr. Curro is personally liable for the violations of the U.T.P.A. described above and that the violations were intentional.³

The case will now be set for hearing on the issues of remedies.

The clerk may incorporate this order in the docket by reference.

Dated:

4/2/09 
G. Arthur Brennan
Justice, Superior Court

³ As an alternate basis for establishing N. Curro's personal liability, the State argues that I should "pierce the corporate veil" between the companies and N. Curro. Given the findings above, it is unnecessary to reach that issue.